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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 349.

UNITED MINE WORKERS OF AMERICA,

Petitioner,

vs.

FLAME COAL COMPANY, CO-DEE COAL COMPANY and AMANDA COAL COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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BRIEF FOR RESPONDENTS IN OPPOSITION.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondents Flame Coal Company, Co-Dee Coal Company and Amanda Coal Company in opposition to the petition for writ of certiorari filed herein, respectfully represent:

QUESTIONS PRESENTED.

1.

In an action under Section 303, Labor Management Relations Act of 1947, against a labor union for damages claimed to have resulted from a labor dispute wherein plaintiffs contended that certain tactics of defendant constituted violations of Section 303 by the union and that the union's entire course of conduct during the dispute also constituted unlawful interference with plaintiffs'

businesses violative of State common law, did the District Court have jurisdiction to determine liability under the common law or non-Federal grounds asserted in support of the single cause of action?

2.

Assuming, for the purpose of argument, that as a prerequisite to their right to maintain the action, plaintiffs were required to show by evidence that the Union had been guilty of a secondary boycott, was the conflicting evidence in this case sufficient as a matter of law to permit a finding that the Union had engaged in such boycott?

3.

Where the common law of a state permits recovery of punitive damages for wilful and malicious wrong, and one of the grounds supporting an alleged cause of action is based upon violation of such common law, and the evidence shows violence and intimidation sufficient to establish such a violation, is the Federal Court precluded from awarding such damages because jurisdiction is conferred upon it by a supporting ground charging violation of Section 303, Labor Management Relations Act of 1947?

4.

Was Rule 51, Federal Rules of Civil Procedure, complied with in such manner as to preserve petitioner's right to complain of the trial court's refusal of a proffered instruction, and, if so, was such ruling erroneous where the instruction was improperly drawn and the trial court's charge as a whole fairly covered the subject of same?

STATEMENT OF THE CASE.

The Evidence.

The facts in this case (and evaluation of them) were summarized by the Court of Appeals, concisely, dispassionately, and with a careful restraint. Since the picture painted by petitioner UMW differs so widely from that portrayed by the court, it seems appropriate to demonstrate that the judicial resumé of the facts is in accord with the record. Therefore, the respondents quote from the opinion below, supplying only record references and a few brief notes considered to be significant.

"Plaintiffs, Flame Coal Company, Co-Dee Coal Company and Amanda Coal Company, are Kentucky Corporations, referred to herein as Flame, Co-Dee and Amanda (R. 73a-74a). At the time of the alleged wrongs, Co-Dee and Amanda were engaged in the auger mining of coal in Eastern Kentucky (R. 73a-74a). The coal mined by them was sold to Flame (R. 74a, 87a, 507a, 508a), and transported by independent truckers to the premises of Flame (R. 75a, 92a, 219a, 223a, 230a, 256a, 262a) where it was processed and loaded into railroad cars for shipment to Flame's customers (R. 74a). Flame, Co-Dee and Amanda are controlled by one person, Mrs. Virginia C. Collins, who is the principal stockholder of each, but each had one or more stockholders not common to the others (R. 127a, 128a, 141a).

"Plaintiffs were among one hundred and seventy-six (176) coal companies in the southeastern Kentucky-northeastern Tennessee region which had not signed the National Bituminous Coal Wage Agreement of 1950, as amended in 1958 (R. 357a-358a, 373a). In the spring of 1959, starting about March 17, the defendant, United Mine Workers of America, carried on a campaign to obtain

agreements with unsigned companies, including plaintiff Flame (R. 358a, 373a, 376a-377a). The campaign was conceived and prosecuted on a grand scale (R. 358a-362a, 389a). Spectacular and varied methods were employed. Mass picketing at the tipple sites (R. 91a-92a, 196a, 272a, 274a, 276a, 280a), on the highways (R. 146a, 200a), on railroad sidings (R. 166a, 176a), and at the mines (R. 233a)[1] was carried on. Pickets, sometimes numbering in excess of a thousand men, roamed throughout the area in motor convoys (R. 93a, 196a, 200a, 276a). The persuasion of sheer numbers was supplemented by more violent and forceful methods. Trucks were stopped at tipples (R. 258a, 275a-276a), and on the way to and from them (R. 225a); their loads were dumped on, and off of, the highway (R. 98a, 147a, 278a). Mine and tipple workers were beaten (R. 277a-278a). Strong threats of violence were made to the independent truck drivers to persuade them to discontinue transporting coal from the mines to the tipples (R. 155a, 259a). After April 30, 1959, when mass picketing was substantially discontinued because of a federal court injunction (there was evidence by defendant that the picketing convoys were stopped because troublesome strangers were joining them (R. 363a, 392a-393a)) the pattern of coercion took a different and still more violent turn. Railroad tracks and bridges were dynamited (R. 102a-105a, 163a, 171a-173a), as were tipples (R. 198a, 283a), trucks (R. 287a) and other equipment (R. 102a, 202a). In fulfillment of a prophetic warning to truckers and others that 'when the leaves come out on the trees' more convincing methods would be employed (R. 155a), the Flame tipple was put under gunfire from the nearby

[1] Actually, there was little evidence of picketing at "mines." The picketing was aimed principally at tipples and preparation plants which were the outlets for mines (R. 146a-147a).

hills almost daily (R. 100a, 184a, 209a). There was evidence that guards at the tipple, on some occasions, returned the fire (R. 187a).

"The web of persuasion extended over a wide area (R. 344a-345a). Mass picketing at the Flame tipple prevented the processing of coal there (R. 93a-94a, 183a, 187a). Mass picketing at a railroad switching point prevented the removal of coal from the tipple (R. 95a-97a). Trucks and automobiles were struck by bullets (R. 184a-185a, 231a, 262a-263a) and that, with other threats, violence and interference, persuaded truckers to give up hauling coal from the Co-Dee and Amanda mines to the Flame tipple (R. 98a, 185a, 208a, 224a, 232a, 257a, 264a-265a, 287a). On eight different occasions, the railroad spur track leading to the tipple was dynamited (R. 105a, 163a).[1]

"Field representatives of defendant United Mine Workers directed and led the convoys of pickets (R. 199a, 381a, 401a) and were present at or near the scene of much of the described violence (R. 153a, 193a-196a, 273a-279a). These field men were selected and appointed by the President of District 30 of the defendant United Mine Workers (R. 381a). The events here involved occurred within District 30 (R. 344a).[2] Specific identification of the riflemen in the hills, the dynamiters, and other individuals, perpetrators of violence and threats, was not made (R. 163a, 174a, 189a, 209a, 217a). Defendant's witnesses testified of instructions given to the members of the convoys to behave themselves and not violate the law (R. 360a-

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[1] Tracks were dynamited seven times. One of these eight blasts was in destruction of a "pole" (R. 102a).

[2] From March 2, until June 29, the International Union poured over $1,000,000.00 into District 30 in support of the strike and strikers (R. 379a).

361a, 389, 398a).[1] Our review of the record, however, satisfies us that there was admissible and competent evidence from which the jury could infer and find that defendant union was the author of, and responsible for, the violence and illegal conduct which effectively interrupted and interfered with the business of plaintiffs. The evidence was sufficient to support a verdict and judgment requiring defendant union to respond in damages for the acts of its members, agents and representatives."

SUMMARY OF ARGUMENT.

1.

Petitioner's attack on the applicability of the doctrine of ancillary or pendent jurisdiction in a case involving an alleged violation of Section 303, Labor Management Relations Act, has been unsuccessfully urged by it in three recent, prior decisions of the Court of Appeals for the Sixth Circuit, in each of which certiorari has been denied. The fact that the common law ground, if tried alone as an independent cause of action in the State court, would have taken the procedural form of a class suit, rather than a suit against a jural entity does not affect the applicability of this doctrine. The contention that its applicability is affected by the principle of federal preemption has been twice rejected by this Court in cases where the union's activity was marked with violence and intimidation, as is the case here.

2.

Argument under Question 2 presented by petitioner seeks a review by this Court of voluminous evidence from

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[1] One of these leaders (who testified of admonitions to pursue good behavior) violated an injunction of the United States Court, pled guilty, was fined and jailed, continued to receive his salary, and later was promoted by UMW (R. 348a, 380a-381a).

which varied inferences could reasonably be drawn, and asks the Court to draw inferences and reach a conclusion of fact in accord with petitioner's argument. Certiorari should not be granted for the purpose of reviewing conflecting evidence, or evidence from which differing inferences may validly be drawn, in a case which has no special or important public significance, concerns no Constitutional question or right, and which in its evidential aspects has become merely academic by the enactment of subsequent legislation.

3.

The argument that a federal court, which has jurisdiction conferred upon it under an alleged violation of a provision of the Labor Management Relations Act, cannot allow recovery of punitive damages for a violation of the State common law, alleged in the same action, has been twice rejected by this Court in cases where the union activity complained of was marked with violence and intimidation, as is the case here.

4.

To the trial court's refusal of petitioner's proffered Instruction IV, only a general exception was taken, for which reason the action of the court is not subject to review. However, had proper objection been taken, the ruling of the trial court was correct, as the proffered instruction was erroneous, in that it would eliminate as a proscribed objective of Section 303 of the Act the union's inducement of employees of other employers to force their employers to cease doing business with respondents. It was also erroneous in that it would change the doctrine of ancillary jurisdiction so as to make a favorable decision on the federal question a prerequisite to the

court's jurisdiction over the common law claim. A reading of the instructions as a whole discloses that the trial court adequately covered the subject of petitioner's proffered instruction.

THE ARGUMENT.

QUESTION NO. 1.

Doctrine of ancillary or pendent jurisdiction as followed by lower court is supported by applicable decisions of this Court.

Petitioner denies the jurisdiction of the district court to entertain a case where a claim under Section 303 of the Labor Management Relations Act of 1947 (29 U. S. C. A. 187) is joined with a non-federal common law action for tort, saying that the rule of ancillary or pendent jurisdiction is inapplicable because, (1) if the common law ground was tried alone as an independent cause of action in a State court, it would take, in this particular instance, the procedural form of a class suit rather than a suit against a jural entity, and (2) it is precluded by the doctrine of federal preemption.

Basically, this is the same question which has been considered and disposed of, contrary to petitioner's contention, in the cases of *United Mine Workers v. Meadow Creek Coal Co.*, 263 F. 2d 52 (C. A. 6, 1959), cert. denied 359 U. S. 1013; *United Mine Workers of America v. Osborne Mining Company*, 279 F. 2d 716 (C. A. 6, 1960), cert. denied 364 U. S. 881; *Gilchrist v. United Mine Workers of America*, 290 F. 2d 36 (C. A. 6, 1961), cert. denied 368 U. S. 875.

Specifically, in the *Gilchrist* case, the question was put to the appellate court in the following form:

> "In an action against the defendant union, an unincorporated association, predicated upon an alleged viola-

tion of Federal law, which law permits an action against such a labor organization as an entity, did the Court have jurisdiction to render judgment against the defendant in part under the common law of the State of Kentucky, even though the law of Kentucky does not recognize an unincorporated labor organization as a jural entity subject to suit?"

In its petition for certiorari in *Gilchrist*, the petitioner contented itself with submission of the basic question here involved in the following form:

"In an action against a labor union for damages claimed to have resulted from a labor dispute under Section 303 of the Act wherein plaintiffs contended that certain actions which occurred during the dispute constituted violations of Section 303 by the union and that the union's entire course of conduct during the dispute constituted unlawful interference with plaintiffs' businesses violative of State common law, did the District Court have jurisdiction to determine liability under the common law or non-Federal cause of action?"

While petitioner seeks to persuade the Court that the requirement in Kentucky state courts that a union, or other voluntary association, be proceeded against in a class action, rather than sued as a jural entity, is a matter of substance, as distinguished from a procedural matter concerning merely the manner and the means by which a right to recover is enforced, this argument is not supported by the law of Kentucky.

Voluntary unincorporated associations are considered legal entities in Kentucky. In *International Union of Operating Engineers v. Bryan*, Ky., 255 S. W. 2d 471, 474, the Court stated:

"The distinction between an unincorporated labor union and a corporation is apparent. Although re-

garded as a legal entity, an unincorporated union is a voluntary association which is not distinct from its individual members, as a corporation from its stockholders."

That the bringing of suit against a voluntary association in Kentucky by class action is merely procedural is demonstrated by the following rulings of the Court of Appeals of Kentucky. In *U. M. W. A. v. Comer*, 159 Ky. 605, 167 S. W. 891, this same petitioner was held responsible for damages arising out of libel, and its argument that it was immune to suit was disregarded in view of the fact that it took no steps to raise a question as to the procedural form of action by which it was brought into court. The same result was reached by the Court in the case of *Hotel, Restaurant & Soda Fountain Employees Local Union No. 181 v. Miller*, 272 Ky. 466, 114 S. W. 2d 501.

The District Court accurately resolved the question posed by petitioner as to the procedural form of the suit with reference to Kentucky law with the following statement (R. 68a-69a):

"Defendant's contention that this suit would have failed in a state court is more speculative than real. If the suit would have failed as brought, such failure would have been on procedural rather than substantive grounds. But the suit was brought in this court and satisfies the procedural requirements thereof. Who can say that the plaintiffs would not have proceeded differently, and so satisfied the Kentucky procedural requirements, if the action had been brought in a state court? In any event, the contention is immaterial since Rule 17(b)(1), Federal Rules of Civil Procedure, renders the defendant subject to suit in federal court for enforcement of substantive rights arising under laws of the United States. This is such a suit."

On the subject of lack of diversity, the trial court made the following observation (R. 67a):

> "Here, however, one of the grounds of the cause of action was alleged under Section 303 of the Labor-Management Relations Act (29 USCA 187). By subsection (b) thereof, the suability of labor organizations is established and jurisdiction in such cases is conferred upon this court. Since jurisdiction arises under the laws of the United States (28 USCA 1331), it is elementary that the diversity requirement of 28 USCA 1332 need not be satisfied."

The Court of Appeals also specifically ruled upon this question, following the reasoning of the trial court, making this conclusion (Appendix to Petition, iv):

> "However, federal jurisdiction attached here because of the secondary boycott and under Rule 17(b) F. R. Civ. P. defendant, an unincorporated association, is suable as such and in the federal court may be made to respond in damages for its tortious conduct (29 U. S. C. A. 187). Gilchrist v. United Mine Workers of America, supra (290 F. [2] 39); United Mine Workers of America v. Osborne, supra (279 F. [2] 716)."

Rather than being "a federal question important in the construction and administration of the Act's Section 303," as averred in the petition (p. 20), it is submitted that this is merely a procedural question which under all applicable law is controlled by Rule 17(b)(1), Federal Rules of Civil Procedure.

But, in addition to the attack on the jurisdiction of the District Court based upon the procedural law of Kentucky, in support of the basic question of the applicability of ancillary or pendent jurisdiction in an action under Section 303, Labor Management Relations Act, petitioner asserts that such jurisdiction is precluded by the doctrine of "federal preemption," and that the ruling of the District Court and the ruling of the Court of Appeals to the contrary is a departure from the decisions of this Court.

In applying the doctrine of ancillary or pendent jurisdiction, the party against whom it is invoked usually makes the contention that his type of action should be an exception to the rule. The Court gives full answer to this argument in the case of *Hurn v. Oursler*, 289 U. S. 238, in response to the question of whether cases involving patents, trademarks and copyrights constitute an exception to the general rule, as follows (p. 245):

> "The Siler and like cases announce the rule broadly without qualification; and we perceive no sufficient reason for the exception suggested. It is stated in these decisions as a rule of general application, and we hold it to be such—as controlling in patent, trademark and copyright cases as it was in the cases where it is announced."

In the response to the assertion of this basic question upon petition filed in the *Osborne* case, and in response to same upon petition filed in the *Gilchrist* case, numerous cases were briefly referred to in support of the declaration in the *Hurn v. Oursler* case that this is "a rule of general application." We again call these cases to the attention of the Court. The rule has been applied:

(1) In cases involving a claim in the field of federal patent or trademark law with an accompanying state unfair competition claim in such cases as *Hurn v. Oursler, supra; Armstrong Paint and Varnish Works v. Nu-Enamel Corp.*, 305 U. S. 315 (1939); *in re Amtorg Trading Corp.*, 75 Fed. 2d 826 (Ct. of Patent App., 1935); *Edelman & Co., v. AAA Specialty Company*, 88 Fed. 2d 852 (7th Cir., 1937); *Sinko v. Snow-Craggs Corporation*, 105 Fed. 2d 450 (7th Cir., 1939); *Maternally Yours v. Your Maternity Shop*, 234 Fed. 2d 538 (2nd Cir., 1956).

(2) Under the Jones Act wherein claims are combined for unseaworthiness and maintenance and cure with

an admiralty claim in such cases as *Jordine v. Walling*, 185 Fed. 2d 662 (3rd Cir., 1950); *Troupe v. Transit Company*, 234 Fed. 2d 253 (2nd Cir., 1956); *Doucette v. Vincent*, 194 Fed. 2d 834 (1st Cir., 1952).

(3) In cases wherein claims under the Federal Transportation Acts are combined with claims under the state or common law in such cases as *Southern Pacific Company v. Van Hoosar*, 72 Fed. 2d 903 (9th Cir., 1934); *Strachman v. Palmer*, 177 Fed. 2d 427 (1st Cir., 1949); *Chicago Great Western Railway Co. v. Chicago, Burlington and Quincy Railway Co.*, 193 Fed. 2d 975 (8th Cir., 1952).

(4) In cases wherein a claim under the Federal Securities and Exchange Act is combined with a state or common law claim for fraud in such cases as *Errion v. Connell*, 236 Fed. 2d 447 (9th Cir., 1956); *Jung v. K & D Mining Co.*, 260 Fed. 2d 607 (7th Cir., 1958).

(5) In cases wherein claims under the Sherman and Clayton Acts are combined with claims under the state law or common law dealing with monopoly or trusts in such cases as *Southside Theatres v. United West Coast Theatres Corporation*, 178 Fed. 2d 648 (9th Cir., 1949); *Braddick v. Federation of Shorthand Reporters*, 115 F. Supp. 550 (S. D. N. Y., 1953).

(6) In cases wherein claims under the Fair Labor Standards Act are combined with claims for compensation outside of said acts in such cases as *Manosky v. Bethlehem Hingham Shipyard*, 177 Fed. 2d 529 (1st Cir., 1949); *Hogue v. National Automatic Parts Association*, 87 Fed. Supp. 816 (E. D. Mich., 1949); *Wertanen et al. v. Welduction Corporation*, 151 Fed. Supp. 440 (E. D. Mich., 1957).

(7) In cases wherein claims under statutes relating to national banks are combined with claims under the state

or common law in such cases as *Gulley v. First National Bank of Meridian*, 81 Fed. 2d 502 (5th Cir., 1936).

(8) In cases wherein a claim complying with the diversity of citizenship and jurisdictional amount requirements is combined with a claim which does not comply with such requirements in such cases as *American Fidelity & Casualty Company v. Owensboro Milling Company*, 222 Fed. 2d 109 (6th Cir., 1955).

Applicable to this case, as in the *Osborne* case, and in the *Gilchrist* case, is the quotation from *Errion v. Connell*, 236 Fed. 2d 447, 454:

> "It is alleged in the complaint in our case, and the trial court found, a single cause of action involving a single fraudulent scheme to defraud Mrs. Connell of her property. There were involved two types of property, one being securities over which the Federal Court had jurisdiction, and the other non-securities over which the Federal Court normally has no jurisdiction. But the single fraudulent scheme arising out of the same set of facts encompassed both types of property. The thought of requiring two lawsuits in this situation is untenable. We, therefore, hold that the trial court could correctly award damages for the entire fraudulent scheme, even though non-securities were involved."

Petitioner's argument that the application of the rule of ancillary or pendent jurisdiction as expressed in the case of *Hurn v. Oursler* conflicts with the decisions of this Court because of the doctrine of federal preemption is without merit. This specific question has been considered by the Court and has been disposed of, contrary to petitioner's contention, in the cases of *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656, and *International Union, U. A. A. & A. I. W. v. Russell*, 356 U. S. 634.

In *Laburnum*, in dealing with the doctrine of federal preemption, and speaking of the federal statute which is before the Court in this action, it was said (p. 666):

> "To recover damages under that section is consistent with the existence of jurisdiction in state courts to enforce criminal penalties and common-law liabilities generally. On the other hand, it is not consistent to say that Congress in that section, authorizes court action for the recovery of damages caused by tortious conduct related to secondary boycotts and yet without express mention of it, Congress abolishes all common-law rights to recover damages caused more directly and flagrantly through such conduct as is before us."

In *International Union, etc., v. Russell*, 356 U. S. 634, a union and its agent were sued in a state court for malicious interference with an employee's lawful occupation. It was contended that the alleged wrongful acts constituted unfair labor practices under the Labor Management Relations Act 1947, and that there was such federal preemption in this area of legislation as to deprive the state court of jurisdiction. This Court referred to its holding in the *Laburnum* case, and to the contention immediately before it saying (pages 641-642):

> "This case is similar to Laburnum in many respects. In each, a state court awarded compensatory and punitive damages against a union for conduct which was a tort and also assumed to be an unfair labor practice. The situations are comparable except that, in the instant case, the Board is authorized, under § 10(c) of the Federal Act, to award back pay to employees under certain circumstances. We assume, for the purpose of argument, that the Board would have had authority to award back pay to Russell. Petitioners assert that the possibility of partial relief distinguishes the instant case from Laburnum. It is our view that Congress has not made such a distinction and that it has not, in

> either case, deprived a victim of the kind of conduct here involved of common-law rights of action for all damages suffered."

And again, on page 645 of the opinion, the Court stated:

> "If the employee's common-law rights of action against a union tortfeasor are to be cut off, that would in effect grant to unions a substantial immunity from the consequences of mass picketing or coercion such as was employed during the strike in the present case."

In the case of *San Diego Building Trades Council v. Garmon*, 359 U. S. 236, cited in the petition, this Court distinguished its holding there from its rulings in *Laburnum* and in *United Auto Workers v. Russell*, stating that in those cases "* * * we have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order." (p. 247.) Here, as in *Laburnum* and *Russell*, the activities of the petitioner were marked with mass picketing, dynamiting, shooting, violence and intimidation. The type of conduct which made the doctrine of federal preemption inapplicable in those cases also makes that doctrine inapplicable in the instant case.

QUESTION NO. 2.

This Court does not grant certiorari for mere review of evidence, but were the rule otherwise, the evidence here supports the findings of the jury and the conclusions of the two courts below.

On this question the petitioner is asking the Court to grant certiorari because "the evidence did not suffice as a matter of law to sustain a Section 303 violation." That the evidence was conflicting and susceptible of widely differing interpretations can easily be seen by comparing the peti-

tioner's version (in its petition) with the version of the Court of Appeals (heretofore quoted). In short, petitioner asks this Court to review voluminous and conflicting evidence to see whether or not it supports a factual conclusion.

It is doubtful that such a task is the proper responsibility of this Court, or within the realm of that function which the Court was intended to serve in our federal judicial system.

Apparently, it is not even contended that the question is one of any significant public concern. It is important only to the litigants. Under varying circumstances, individual members of this Court have often expressed reservations about dissipating the time and energy of the Court in weighing evidence that has been subjected to the scrutiny of two courts below.[5] Whatever may have been the division of opinion among the members of the Court as to the nature of questions presenting a breadth of consequence sufficient to justify certiorari, the Court has made it clear that, as a general proposition, it does not engage in a mere review of evidence unless there is some important and compelling reason for so doing.[6] As Mr. Justice Black stated in *National Labor Relations Board v. Waterman Steamship Corporation*, 309 U. S. 206, "We do not ordinarily grant certiorari to review judgments based solely on questions of fact."

Petitioner asserts that certiorari should be granted because, as it says, there are some twenty-seven cases pending against it which involve total claims of approximately

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[5] *New York, New Haven & Hartford Railroad Co. v. Henagan*, 364 U. S. 441; *Sentilles v. Inter-Caribbean Shipping Corporation*, 361 U. S. 107; *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 518; *Carter v. Atlanta & St. A. B. R. Co.*, 338 U. S. 430, 437; *Wilkerson v. McCarthy*, 336 U. S. 53, 64.

[6] *Houston Oil Co. of Texas, et al., v. Goodrich, et al.*, 245 U. S. 440; *United States v. Johnston*, 268 U. S. 220.

ten million dollars,[7] and "which are concerned with the question of conduct necessary to come within the proscriptions of the federal statute."

There have been four of these cases in the United States Court of Appeals for the Sixth Circuit, including the present case. *Osborne*[8] followed *Meadow Creek*,[9] and it was indicated that the factual pattern in the second case was unlike the first. *Gilchrist*[10] was next, and it was said that it differed from *Osborne* in material factual particulars. The present litigation was next, and in the Court of Appeals the petitioner undertook to demonstrate that the particular facts in this case should not be governed by the decisions in the preceding cases. If the petitioner is now suggesting that the twenty-seven cases presently pending against it involve factual situations which concern "the question of conduct necessary to come within the proscription of the federal statute" (p. 34), and therefore will be forthcoming for review in this forum, it is hardly an inducement to grant certiorari in the present instance.

Whether or not a secondary boycott has been perpe-

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[7] In a petition for writ of certiorari in *UMWA v. Osborne Mining Company*, 6 Cir. 279 F. 2d 716, cert. den., 364 U. S. 881, petitioner displayed to the Court some twenty-five cases against it involving claims which totaled over twenty-four million dollars.

When petitioner was seeking certiorari in *Gilchrist v. UMWA*, 6 Cir., 290 F. 2d 36, cert. den., 368 U. S. 875, it complained that it was defendant in some twenty-two suits which involved claims totaling over eighteen million dollars.

Thus, though the number of its problems have not materially diminished, the potential of its anxiety is now reduced by more than one-half.

[8] *UMWA v. Osborne Mining Co.*, 6 Cir., 279 F. 2d 716, cert. den., 364 U. S. 881.

[9] *UMWA v. Meadow Creek Coal Co.*, 6 Cir., 263 F. 2d 52, cert. den., 359 U. S. 1013.

[10] *Gilchrist v. UMWA*, 6 Cir., 290 F. 2d 36, cert. den., 368 U. S. 875.

trated involves (1) conduct and (2) objectives (3) within a given pattern of circumstances. These factors can only be measured in terms of evidence bearing upon them, and such evidence (particularly in the realm of objectives) is susceptible of differing interpretations and convictions. To suggest that this Court invite the burden of resolving such problems in the numerous cases pending against petitioner is to ask the Court to do that very thing which it has said it has neither the opportunity nor duty to do.

Petitioner contends that certiorari should be granted here because of principles or policies enunciated by the Court in four cited decisions. It can readily be demonstrated that these four cases lend no support to the present insistence of petitioner:

Alcoa Steamship Co. v. United States, 338 U. S. 421, involved a wide-spread principle of American maritime law, and it was said, "At bar is the single question of contract interpretation whether a carrier's 'Goods or Vessel lost or not lost' provision survives the terms of the government standard form bill of lading." That is a far cry from a demand that certiorari be granted to determine whether this Court's evaluation of testimony will be the same as that of a jury.

International Brotherhood of Teamsters, Local 695 v. Vogt, Inc., 354 U. S. 284, involved "the limits imposed by the Fourteenth Amendment on the power of a State to enjoin picketing." Even here, doubt was expressed as to whether or not the case presented a substantial federal question (p. 287). Another noteworthy distinction was described in the dissent of Mr. Justice Douglas, the Chief Justice, and Mr. Justice Black, thus (296):

> "But where, as here, there is no rioting, no mass picketing, no violence, no disorder, no fisticuffs, no coercion—indeed nothing but speech—the principles an-

nounced in Thornhill and Swing should give the advocacy of one side of a dispute First Amendment protection."

In *United States v. Standard Oil Company*, 332 U. S. 301, the Court was "asked to create a new substantive legal liability without legislative aid and as at the common law" touching upon the Government's right to recover from a tort-feasor medical expenses and service pay expended while a soldier was recuperating from injuries. A footnote indicated that "upwards of 450 instances" involved the same problem, "and that additional instances were being reported by the War Department at the rate of approximately 40 a month." From a standpoint of public concern and importance, it would be hard to imagine a situation more dissimilar to the one here presented by petitioner. In fact, in the *Standard Oil* case, the Court suggested that its significance was comparable to *Erie R. Co. v. Tompkins*, 304 U. S. 64. It was also noteworthy that in resolving the problem before it, the Court was not called upon to perform the function of a jury.

Petitioner's argument concerning the relevance of *Local 761, International Union of Electrical, Radio & Machine Workers v. National Labor Relations Board*, 366 U. S. 667, is merely a repetition of its previous unsuccessful insistence in its petition for writ of certiorari in the *Gilchrist* case. In brief, petitioner interprets *Local 761* as establishing a comprehensive and inflexible criterion whereby all alleged secondary boycotts involving activity at or near a struck employer's premises can be readily catalogued. The only factors involved in this formula, as viewed by petitioner, are those of geographical conditions and character of work performed by neutral employees. According to this theory, there cannot possibly be any secondary boycott unless (1) there is a "second gate" and

(2) the neutral employees are performing tasks unrelated and unnecessary to the conduct of the primary employer's ordinary business. The absence of either of these two requisites automatically excludes the possibility that a secondary boycott is in progress.

As pointed out by respondents in the *Gilchrist* case, this is not a proper interpretation of *Local 761* because it completely ignores the *objective* of the striking union. In *Local 761* the Court made it clear that inducement or encouragement which naturally and incidentally results from peaceful and traditional picketing, by enlisting the sympathies of third parties, is not proscribed by the Act merely because the picketing union hopes for such result, and can therefore be said to have it as an objective. This is true of peaceful picketing at a primary employer's job site (or gate), though not used by the struck employer's employees, but used by neutral employees performing work necessary to the normal operations of the business. However, this Court did not say or infer that violent, deliberate and intentional coercion of the employees of neutral persons to a concerted action, with the aggressive and immediate purpose of involving neutral parties, and through them exerting pressure upon a primary employer, is protected or outside the scope of conduct forbidden by the Act simply because of the location of the activity. On the contrary, the Court noted that "the distinction between legitimate 'primary' activity' and banned 'secondary activity' * * * does not present a glaringly bright line" (p. 673), and reviewed the history of the Board's interpretation of § 8(b)(4)(A) in light of "unfolding variant situations," stating (p. 674):

> "* * * the Board and the courts have attempted to devise reasonable criteria drawing heavily upon the means to which a union resorts in promoting its cause.

> Although no rigid rule which would make * * * a few factors conclusive is contained in or deducible from the statute, * * * in the absence of admissions by the union of an illegal intent, the nature of the acts performed show the intent."

Petitioner continues to point to *National Labor Relations Board v. International Rice Milling Company*, 341 U. S. 665, in support of the proposition that "violence on the picket line is not material."[11] In *Rice Milling* the Court also said (p. 672), "It is the *object*[12] of union encouragement that is proscribed by that section, rather than the means adopted to make it felt."

Since objectives are the determinative element by which secondary boycotts are identified, and the nature of the acts performed show the intent (or objective), it is not an accurate premise to quote this Court as establishing the undiluted principle that violence is "not material" in determining the motives and intent behind a given pattern of conduct.

This was no case of "inducements or encouragements reaching individual employees of neutral employers only as they happen(ed) to approach the picketed place of business," such as was described in *International Rice Milling* (p. 671). Neither was it a case where a union carried on peaceful picketing in the *hope* that all persons would honor the picket line, such as was discussed in *Local 761* (p. 673). In this instance the petitioner's adherents saw to it that neutrals would not only be influenced, but would be forced to cease doing any business with the employers who were the objects of its activity. It did not *hope* that the sympathies of neutral truck drivers would be enlisted, and they would thereby be induced to withhold

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[11] Usually omitting the words "In the instant case."

[12] Emphasis supplied.

services. On the contrary, petitioner's proponents utilized every form of unabashed violence to see to it that truckers were driven off the job. Petitioner's pickets activated themselves not only at the business location of their targets, but prowled throughout the whole area in motorcades and convoys so gigantic as to admit of no possible interpretation other than an intent to intimidate. The wage agreement which was the core of this drive speaks for itself, and respondents interpret it as nothing more nor less than a thinly-veiled compact to the effect that the parties to the contract would refuse to do any sort of business with those who were not signatories (R. 29a-34a).

Petitioner argues that inducement of truckers was not secondary activity because the truckers were not "independent" or "neutral." This same contention was belabored in the petition for writ of certiorari in the *Gilchrist* case, and with just as little evidence to justify it. Petitioner declares (p. 28) "Moreover, as between Companies and the truckers, far more than the ordinary arms-length relationship existed. Though Mrs. Collins asserted truck drivers were not under her control (R. 75a), obvious and elemental economic circumstances and necessity placed each under the practical control of Mrs. Collins, as the person in control of the three operations." Significantly, no record citation is made in support of this gratuity from petitioner. Not only did Mrs. Collins state that truckers were not under her control, but the truckers also so indicated (R. 219a, 223a, 230a, 256a). An assertion that these neutrals were "each under the practical control of Mrs. Collins" is surprising. Ray Proffitt (R. 222a), Hubert Hall (R. 229a), Jedd Duncil (R. 258a), and Aubrey Nichols (R. 262a) all testified that they were hauling coal

for several operators, among whom Mrs. Collins was only one.

Finally, petitioner repeats the familiar insistence that "incidents relating to the L & N train crew do not fall within the scope of Section 303 because they concern railroad employees excluded by the Act's definitions of 'employer' and 'employee' ". (p. 32.) Petitioner concedes, as it must, that all judicial authority is to the contrary,[13] but argues that this is at odds with congressional intent because a recent amendment to the Act changes the phrase "employees of any employer" to read "any individual employed by any person." It is said that this amendment would have been unnecessary had Congress originally intended to include railroad employees within the proscriptions of the Act, and it quotes legislative history and remarks of legislators. This is a peculiar argument. Congress was confronted with conflicting interpretations of an Act. It was the Board's interpretation that railroad employees were excluded from that Act. Courts were unanimously of an opposing view. Congress resolved this divergence of opinion by taking action which coincided with decisions of the courts, yet petitioner insists that the Board had been reflecting the intent of Congress. Nothing is cited in the legislative history to indicate that the Congress had experienced a change of conviction. On the contrary, petitioner quotes Senator Curtis (appendix xxi) as desiring to close "loopholes."

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[13] *International Rice Milling Co. v. NLRB*, 5 Cir., 183 F. 2d 21; *W. T. Smith Lumber Co. v. N. L. R. B.*, 5 Cir., 246 F. 2d 129; *Great Northern Railway Co. v. NLRB*, 9 Cir., 272 F. 2d 741; *Superior Derrick Corp. v. NLRB*, 5 Cir., 273 F. 2d 891; *Knapp v. United Steel Workers of America*, D. C. Minn., 179 F. Supp. 90.

On the appeal of *Rice Milling* to this Court, the Board abandoned its contention that railroad employees were outside the ban of § 303. Certiorari was denied in the *Superior Derrick* case, 364 U. S. 816.

At any event, by the very legislation to which petitioner refers, the importance of this debated construction has become moot. In *Rice v. Sioux City Cemetery*, 349 U. S. 70, the Court was faced with a legal problem which had been removed from the realm of future concern by subsequently enacted legislation, and it was determined that such development dissipated that element of " 'special and important reasons' for granting the writ of certiorari." Such is the situation here.

QUESTION NO. 3.

Recovery of punitive damages for violation of common law of Kentucky was proper and is supported by applicable decisions of this Court.

While it is said in the petition that the Court of Appeals did not respond to petitioner's argument questioning the allowance of punitive damages (Petition, p. 39), this was one of the five points, out of the fourteen points raised, which the lower court specifically dealt with, ruling thereon as follows (Appendix to Petition, v):

> "(4) *Punitive Damages.* The defendant claims that punitive damages were not recoverable. Under facts so similar to what the evidence here disclosed as to provide appropriate precedent, we held that it was permissible to allow punitive damages. United Mine Workers of America v. Osborne Mining Company, supra; Gilchrist v. United Mine Workers, supra. We need not add here to what was said in those cases."

This argument of the inability of the court to allow recovery of punitive damages where any violation of a provision of the Labor Management Relations Act is involved has been repeatedly raised on behalf of union defendants beginning with the case of *United Construction Workers v. Laburnum Construction Corporation*, 347 U.

S. 656, where this argument was first rejected. In the later case of *International Union, U. A., A. & A. I. W. v. Russell*, 356 U. S. 634, this point was again raised and it was discussed at length in the opinion of the Court. In that case, it was urged, as here, that as the act afforded Russell compensatory relief, he was deprived of common law rights of action for all damages suffered. Again the Court rejected this argument of the union saying that the provision of some compensatory relief in the Act did not mean that Congress necessarily intended such relief to constitute an exclusive pattern for money damages for private injuries, for if an aggrieved party's "common-law rights of action against a union tort-feasor are to be cut off, that would in effect grant to unions a substantial immunity from the consequences of mass picketing or coercion such as was employed during the strike in the present case" (p. 645). Thereafter, the Court refused to grant certiorari in *Meadow Creek, Osborne Mining Company* and *Gilchrist*, in each of which the Court of Appeals for the Sixth Circuit sustained an award of punitive damages.

That punitive damages constitute a well-settled form of relief under the law of Kentucky when there is a wilful and malicious wrong is apparent from the decision in the case of *United Construction Workers v. Laburnum Construction Corporation*, 194 Va. 872, 75 S. E. 2d 694, 347 U. S. 656. In that case, in which the violent conduct of the union followed a similar pattern to that in the present case, the Court approved the allowance by a jury of $100,000.00 punitive damages. See also the case of *Engelman v. Caldwell and Jones*, 243 Ky. 23, 47 S. W. 2d 971; and *L. & N. Railroad Company v. Ritchel*, 148 Ky. 701, 147 S. W. 411.

This same general pattern of conduct in both the *Laburnum* case and in the present case was substantially similar in most respects to that pattern portrayed in the *Meadow Creek* case, in the *Osborne* case, and in the *Gilchrist* case, in all of which punitive damages were allowed. Here, as noted in the opinion of the Court of Appeals (Appendix to Petition, ii), there was "mass picketing" with pickets "sometimes numbering in excess of a thousand men" with this "persuasion of sheer numbers" being "supplemented by more violent and forceful methods, such as trucks being stopped and their loads dumped," "mine and tipple workers were beaten," "strong threats of violence were made to the independent truck drivers," "the Flame tipple was put under gunfire from the nearby hills almost daily" and "on eight different occasions, the railroad spur track leading to the tipple was dynamited."

As pointed out in the opinion in the case of *San Diego Building Trades Council v. Garmon*, 359 U. S. 236, 247-248, it was this type of conduct "marked by violence and imminent threats to the public order" and "intimidation and threats of violence" which supported the allowance of the remedy of punitive damages under state law in the *Laburnum* and *Russell* cases.

It is evident that under the facts in this case, the decision of the Court of Appeals, in approving the award of punitive damages, is in full accord with the case decisions of this Court on the subject.

QUESTION NO. 4.

Petitioner failed to comply with Rule 51, Federal Rules of Civil Procedure, upon district court's refusal to give offered instruction, although, had proper objection been taken, complaint that court's ruling is erroneous is without merit.

Question 4 presented in the petition is based upon charge of error in the trial court's "refusing an instruction proffered by the union charging the jury on the elements essential to a finding that the statute has been violated" (Petition, 4), the statute referred to being Section 303, Labor Management Relations Act, 1947, and the proffered instruction being petitioner's Instruction IV. Such exception as was taken to this instruction was tacked on to an objection to the trial court's instruction relating to secondary boycott in the following manner (R. 484a):

> "The Court erred in its instruction with reference to the secondary boycott provision as sued upon in the complaint in that the Court did not define the boycott in terms of the Statute—that is, Section 303 of the Labor Management Relations Act of 1947, *and the Court erred in refusing to give Instruction Numbers 4 and 5 with reference to the boycott as tendered by the defendant.*" (Italics added.)

Rule 51, Federal Rules of Civil Procedure, Title 28, U. S. C. A., provides that "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

It is submitted that the exception taken by petitioner does not sufficiently comply with the provisions of Rule 51, so as to permit review of the alleged error.

In applying the provisions of Rule 51 in the case of

Palmer v. Hoffman, 318 U. S. 109, 119, the Court stated:

> "In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial."

The Courts of Appeals have consistently held that an exception as general as that taken by the petitioner in this case does not sufficiently comply with Rule 51 so as to permit review of the alleged error. *Detroit Edison Company v. Striker*, 6 Cir., 65 F. 2d 126; *Johnson v. Chesapeake and Ohio Railway Company*, 7 Cir., 227 F. 2d 858; *Hansen v. St. Joseph Fuel Oil & Manufacturing Co.*, 8 Cir., 181 F. 2d 880, cert. denied 340 U. S. 865; *Richfield Oil Corporation v. Karseal Corporation*, 9 Cir., 271 F. 2d 709, 343 U. S. 922.

Refusal of the trial court to give petitioner's Instruction IV was one of the fourteen points raised by it in the court below, however, the Court of Appeals did not consider it to be of such merit as to require discussion (Appendix to Petition, iii).

Had petitioner properly complied with the mandate of Rule 51, neverthless, its claim of error cannot be supported. In the first place, the instruction was improper as it limited all violations charged against the petitioner to those where the object of the union "was either to force plaintiffs to cease doing business with another person or to force plaintiffs and other employers to recognize the union as representatives of their employees" (R. 466a; Petition 40). This would eliminate the union's activity, as shown under the evidence, whereby the employees of

other employers were encouraged and induced to force their employers to cease doing business with the respondents.

The offered instruction was improper for the further reason that it made it necessary for the jury to find that the petitioner had in fact violated Section 303 of the Labor Management Relations Act of 1947 before it could consider the asserted violations of the common law of the state. In other words, this instruction, in effect, would change the established doctrine of ancillary or pendent jurisdiction, under which, as pointed out in the early case of *Siler v. Louisville & Nashville R. Co.*, 213 U. S. 175, 191, where the trial court acquires jurisdiction by reason of a federal question involved, the court has "the right to decide all questions in the case, even though it decided the federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only."

While petitioner complains that the instructions of the district court omitted "the essential element of the strike and picketing's object" and failed to distinguish "between objects of picketing which fall within Section 303's ban and those which do not" (Petition, 41), and insists that for this reason its proffered Instruction IV should have been given, such complaint is without a valid basis when the charge is considered as a whole.

Instructions must be considered as a whole from the point of view of the impression they would seem to convey to a jury of laymen, and not in their individual parts. *Allers v. Bohmker*, 7 Cir., 199 F. 2d 790; *Rosenfeld v. Curtis Publishing Company*, 2 Cir., 163 F. 2d 660; *Southern Railway Company v. Jones*, 6 Cir., 228 F. 2d 203. As stated in the latter case (p. 211), "Paragraphs

lifted from a charge for critical purposes are often confusing or misleading."

Petitioner quotes in its petition (p. 11) certain incomplete parts of a paragraph and says that this was the trial court's charge on secondary boycott. At the point where the extracted, partial quotation ends, the court's charge continues as follows (R. 474a-475a):

> "You have a right to strike against your own employer. The right to strike is a right that must be recognized as one of the guaranteed liberties of our country and of our kind of government. But you do not have a right to have a sympathy strike in the sense that you would go out and cause damages to someone to get them or to get some other person to come into or agree to a contract.
>
> "The defendant had no right to go upon the property of the plaintiffs and menace or threaten their employees, or to place their employees in fear of their jobs, or their life, or of bodily harm.
>
> "Neither did the defendant have a right to interfere with the truck drivers in delivering coal to the ramp and tipple of plaintiffs, nor in leaving after they had delivered it. The defendant, nor any of its members, or the organization, had a right to use against the truck drivers, or the employees of plaintiffs, threats of any kind to induce them to become members of the United Mine Workers of America, or to refrain from commercial relations with the plaintiffs, their employees or independent contractors, for the handling of plaintiffs' coal."

And again, the court said (477a):

> "You are instructed that the defendant had a right to solicit membership in its organization and to use all peaceful means and persuasion to induce persons to become members of the United Mine Workers. For the purpose of carrying out a lawful drive for member-

ship, the defendant and its members had a right to attend at any place where any prospective person or persons for membership might lawfully be for the purpose of peacefully obtaining or communicating information or for peacefully persuading any person to work or to abstain from working.

"In other words, they had a right to go out and solicit membership, they had a right to reason, to argue, to induce in any lawful way a person to become a member in the United Mine Workers, so long as they did not commit unlawful acts.

"The defendants, its officers and members, had a right to picket by peaceful means and by reasonable numbers of persons, the plant and operation of the plaintiffs, but did not have a right to carry on a picket line on the property of the plaintiffs or to use such numbers of men that would induce fear of life, bodily harm or property damage to the employees of the plaintiffs or their truck operators."

While petitioner would have the trial court follow the explicit language of the statute, as pointed out by Judge Wyzanski, in the case of *Cape Cod Food Products, Inc., v. National Cranberry Association*, D. C. D. Mass., 119 F. Supp. 900, 907:

"[T]he object of a charge to a jury is not to satisfy an appellate court that you have repeated the right rigmarole of words, but to make jurors who are laymen understand what you are talking about."

A reading of the charge as a whole demonstrates that the jury of laymen were told, in language that they could understand, the factors involved in this action for damages for the wrongful interference by petitioner with the businesses of the respondents, both as to the federal ground and as to the common law ground, and that, rather than committing error in refusing petitioner's Instruction IV,

error would have been committed had the proffered instruction been given.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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